Supreme Court, U.S.
FILED
OCT 26 1992
OFFICE OF THE CLERK

92-552

CASE NO.: ~~91-7472~~

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOE ALLEN BAKER, M.D.,

Petitioner,

vs.

GULF & WESTERN INDUSTRIES, INC.,
GULF & WESTERN FOOD PRODUCTS CO.,
RISK MANAGEMENT SERVICES, INC.,
and FRANK B. HALL, INC.,

Respondents.

RESPONDENTS', RISK MANAGEMENT SERVICES, INC. AND FRANK B. HALL, INC.'S, BRIEF IN OPPOSITION TO PETITIONER, JOE ALLEN BAKER'S, PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GEORGE P. ROBERTS, JR., ESQ.
ROBERTS & REYNOLDS, P.A.
Suite 300, Comeau Building
319 Clematis Street
Post Office Box 709
West Palm Beach, FL 33402-0709
Tel: 407/832-5800
Broward Line: 305/427-3105

Counsel of record for Respondents,
RISK MANAGEMENT SERVICES, INC.,
and FRANK B. HALL, INC.

QUESTIONS PRESENTED

I. WHETHER CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO RAISE THE ISSUE THAT PATTERSON V. MCLEAN CREDIT UNION SHOULD NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE UNDER TITLE VII IN THE COURTS BELOW.

II. WHETHER CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER DID NOT SEEK RELIEF PURSUANT TO THE CIVIL RIGHTS ACT OF 1991 DURING THE EIGHT YEARS OF PROCEEDINGS IN THE COURTS BELOW.

III. WHETHER CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S ARGUMENT THAT PATTERSON V. MCLEAN CREDIT UNION DOES NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE TO HIM UNDER TITLE VII IS WITHOUT MERIT.

IV. WHETHER CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES PRESENTED ARE ONLY ANCILLARY AND NOT ESSENTIAL, AS THIS CASE CAN BE AFFIRMED ON SEVERAL OTHER DISPOSITIVE GROUNDS.

PARTIES TO THIS CAUSE

JOE ALLEN BAKER

GULF & WESTERN INDUSTRIES, INC.

GULF & WESTERN FOOD PRODUCTS CO.

RISK MANAGEMENT SERVICES, INC.

FRANK B. HALL, INC.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to This Cause	ii
Table of Authorities	v
Statutes and Rules at Issue	vii
Statement of the Facts	1
History of the Case	12
Summary of Argument	21
Argument:	
I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO RAISE THE ISSUE THAT PATTERSON V. MCLEAN CREDIT UNION SHOULD NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE UNDER TITLE VII IN THE COURTS BELOW.	25
II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER DID NOT SEEK RELIEF PURSUANT TO THE CIVIL RIGHTS ACT OF 1991 DURING THE EIGHT YEARS OF PROCEEDINGS IN THE COURTS BELOW.	30

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S ARGUMENT THAT PATTERSON V. MCLEAN CREDIT UNION DOES NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE TO HIM UNDER TITLE VII IS WITHOUT MERIT. 34

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES PRESENTED ARE ONLY ANCILLARY AND NOT ESSENTIAL, AS THIS CASE CAN BE AFIRMED ON OTHER DISPOSITIVE GROUNDS. 36

Conclusion 43

TABLE OF AUTHORITIES

	Page
Adickes v. S. H. Kress & Company 90 S.Ct. 1598, 1602 n.2 (1970)	23
Clark v. Huntsville, 717 F.2d 525 (11th Cir. 1983)	33
Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986)	28
Duignan v. United States, 47 S.Ct. 566, 568 (1927)	23
EEOC v. Federal Labor Relations Authority, 106 S.Ct. 1678, 1681 (1986)	23
FTC v. Groiler, Inc., 103 S.Ct. 2209, 2212 n.6 (1983)	23
General Building Contractor's Association v. Pennsylvania, 102 S.Ct. 3141 (1982)	32
Gomez v. Alexian Bros. Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1982)	28
Lawn v. United States, 78 S.Ct. 311, 324 n.16 (1958)	23
Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985)	33
Mousari v. Beebe Hospital of Sussex County, Inc., 674 F.Supp. 145 (D. Dela. 1987)	28

Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988) 28

Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1980) 15-17, 20,21, 25-27, 28,30

Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303, 1312 (7th Cir. 1985) 33

Rogers v. Lodge, 102 S.Ct. 3272, 3281 (1982) 23

Texas & P.Ry. Co. v. Southern Pac. Ry. Co., 11 S.Ct. 10, 12 (1890) 29

United States v. New York Telephone Co., 98 S.Ct. 364, 369 n.8 (1977) 32

Whitley v. Albers, 106 S.Ct. 1078, 1087 (1986) 32

STATUTES AND RULES AT ISSUE

This case implicates, in addition to 42 U.S.C. § 1981, set forth in Petitioner's Brief, Rule 10(J)(2) of the Local Rules for the United States District Court for the Southern District of Florida, which provides:

> 10(J)(2) Motions for summary judgment shall be accompanied by a memorandum of law, necessary affidavits, stamped addressed envelopes for notice, and a concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. **The papers opposing a motion for summary judgment shall include** a memorandum of law, necessary affidavits, and **a concise statement of the material facts as to which it contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement.**

STATEMENT OF FACTS

Plaintiff, JOE ALLEN BAKER, is a white male physician who practiced medicine at least until 1980 in Belle Glade, Florida. (R7-246). Plaintiff was often referred to as the "Medical Director" of Defendant, GULF & WESTERN, INC's, Okeelanta Sugar Operation from the 1960's until his termination in 1980. (R6-253).

GULF & WESTERN was self-insured for its worker's compensation program. As such, a claims administrator was required by law. (R6-253, para. IV C). In 1978, RISK MANAGEMENT SERVICES, INC., (RISK) entered into a written contract with GULF & WESTERN, whereby it agreed, for monetary consideration, to provide claims administration for GULF & WESTERN's worker's compensation claims for its sugar cane operations. This contract was renewed in De-

cember, 1979. (R8-254, para. 1).[1] This contract did not require RISK to engage or retain any particular physician to provide medical service to GULF & WESTERN's injured workers. (R8-254, para. 2).

RISK, as per its contract with GULF & WESTERN, provided claims administration. (R8-254, para. 3). It would receive claims, determine their compensability, file appropriate forms with the State of Florida's Department of Labor and Employment Security, and make payments of medical bills and employee compensation where appropriate and required. (R8-254, para. 3). RISK was only paid for the service it provided; any payment of medical bills, compensation, or other associated expenses

---

[1] The Statement of Material Facts filed by Defendants, RISK and HALL (R8-254) in support of their Motion for Summary Judgment was uncontroverted by Plaintiff, as required by Rule 10(J)(2) of the Local Rules for the Southern District of Florida; as such, these facts are deemed admitted.

were paid from the account of or funded by GULF & WESTERN. (R8-254, Para. 3).

For many years thousands of foreign seasonal workers have been employed in the sugar cane industry and by GULF & WESTERN. These workers came to the United States under negotiated agreements with the British West Indies Central Labor Organization under limited H-2 temporary Visas (R3-77, pp. 59-61), and could only work cutting cane or as cooks for the cane cutters (R6-230, pp. 8, 11, 39). It is these workers whom Plaintiff refers to in his Amended Complaint as "BWI's." Most of these BWI's were from Jamaica or Barbados. (R77, p. 59).

Approximately half of Plaintiff's volume of medical practice consisted of treating the injured seasonal cane cutters for GULF & WESTERN. (R3-77, p. 71). In fact, he would see as many as two thousand cane cutters per year. (R3-77, p. 71).

There was for many years a billing agreement between several of the sugar mills and various doctors that, as to the seasonal cane cutters who came to the United States by the thousands in the winter, they would have a simplified billing procedure where there was a flat fee billed per patient, per incident. (R6-231, p. 22). This "flat fee" applied only to these contract workers -- not to the year-round employees or otherwise. (R3-77, p. 56).

From 1965 to 1979 Plaintiff had such an agreement with GULF & WESTERN. Plaintiff utilized a "contract medical rate" for his treatment of "BWI" workers, whereby he was paid a flat fee per patient, per incident, rather than itemizing and separately billing each service. (R7-253; R3-77, pp. 47, 48, 51-53, 57). The "flat fee" billing simplified the billing pro

cess. (R6-231, p. 11; R.12-294, p. 203; R.7-241, para. 6).

Plaintiff has conceded that there was no classification of the subject class of workers based upon race or alienage. (R7-246 para. IV(D)(6), R3-77, pp. 60-63, 108-109). If an injured worker was a BWI contract worker, the "flat fee" was paid to Plaintiff. (R3-77 pp. 60-63, 108-109). If the identical black, alien worker were not a BWI imported contract worker, Plaintiff would be paid the non-contract rate, just as for a domestic black or white employee. (R3-77 pp. 60-63, 108-109).

Plaintiff has testified that GULF & WESTERN expected him to give, and he did give, the same good quality of medical care to all GULF & WESTERN employees. (R7-246, para. 4). Plaintiff emphatically testified that, although he was for many years paid at a different rate for treating the BWI contract workers, they always

received the same excellent medical care given all other GULF & WESTERN employees. (R7-246, para. 4). Plaintiff stated that he did not, and would not, render bad or substandard medical care regardless of the fee arrangement. (R3-77, pp. 39, 53, 60-61, 63, 66-67; R.6-234, p. 120; R.7-246, para. 4). Plaintiff's nurse, Ann Cumpton (R6-232, pp. 44, 67), an employee-physician, Dr. Luis Hernandez (R6-235, p. 21), and RISK's claims adjuster, Palmer Pierce (R6-231, pp. 86-87) echoed Plaintiff's testimony in this regard.

On January 1, 1979, Plaintiff changed his method of billing with respect to his treatment of the BWI contract workers. Instead of billing on the basis of the flat fee arrangement, he started billing on a different basis, according to a schedule promulgated under the State of Florida Worker's Compensation Laws, which is a schedule of <u>maximum</u> fees that can be

charged by physicians and other medical personnel. (R7-253 para. IV E; R3-77 pp. 48, 68). Bills submitted in this fashion were approved by RISK's adjusters and paid from the accounts of or funded by GULF. (R8-254, para. 4).

In late 1979 or early 1980, senior management of GULF & WESTERN commenced a review of its sugar cane operations conducted by its food products division, including the worker's compensation program. (R8-254, para. 5). It obtained an audit by Aetnatech Services which was critical of the efficiency of RISK's operations. (R8-254, para. 5). The pertinent comments were sent to RISK for response; however, the response received from RISK was not viewed as productive by GULF & WESTERN's casualty insurance manager, A. G. Turner. (R8-254, para. 6).

Concurrently, Laura Wishart Connaster, of RISK, had observed a pattern of

inflated prescription charges on Plaintiff's bills that were being sent to RISK for review. (R8-254 para. 7). As a result, she and Palmer Pierce, the former claims adjuster of the GULF & WESTERN account, met with Plaintiff on or about April 3, 1980, to discuss these discrepancies and attempt to effect a resolution and settlement. (R8-254, para. 7; R6-231 pp. 34-39).

Because the issue was not resolved, RISK began withholding payment of the portions of bills which they concluded were overcharges. (R8-254, para. 8; R3-77 pp. 105-106; R10-286 p. 91). Plaintiff complained to GULF & WESTERN employee, Tony Alvarez, with whom he had a longstanding relationship. (R8-254, para. 8). As a result, a second meeting was held in Plaintiff's office on May 22, 1980. (R8-254, para. 9). In attendance were the Plaintiff, Palmer Pierce and the comptrol-

ler of GULF & WESTERN's local food products division, Arturo De la O. (R8-254, para. 9). At that meeting, it was disclosed that Plaintiff had advanced RISK's Palmer Pierce four thousand ($4,000.00) dollars in cash. (R8-254, para. 9). No promissory note was executed and the loan was never repaid. (R10-286 p. 67; $3-77 pp. 100-103). The events of the meeting were disclosed tc senior management of GULF & WESTERN in New York. (R8-254, para. 9).

Plaintiff testified that during July or August of 1980, he met with the Safety Vice President of GULF & WESTERN (Richard Sanchez) to determine whether he would continue as Medical Director. Plaintiff testified that although he no longer agreed to use the previous "flat fee," his contract with GULF & WESTERN was verbally renewed for the 1980-1981 harvest season. (R3-77, p. 81; R12-294, p. 141).

Thereafter, as a result of the audit, the disclosure of Plaintiff's loan to RISK's Palmer Pierce, and an overall concern for the effectiveness of the program administration, the decision was made by GULF & WESTERN in New York to terminate the services of RISK and replace them with National Employers. (R8-254, para. 10).

Concurrently, but as an independent act, GULF & WESTERN decided to obtain the services of a new "company doctor" by entering into a written contract with Dr. Raul Ramos, effective August 1, 1980. (R8-254, para. 11). RISK played absolutely no part in the decision not to utilize Plaintiff's services any longer. (R8-254, para. 12). RISK was terminated for the reasons set forth above, and had no input into the selection of Dr. Ramos. (R8-254, para. 12).

RISK was a separate, wholly-owned subsidiary of Frank B. Hall & Co., Inc. There is no entity known as FRANK B. HALL, INC. (R8-254, para. 13). There is no evidence of any direct involvement in any way of the personnel of HALL in the operation of RISK. (R8-254, para. 13).

HISTORY OF THE CASE

Plaintiff filed his Complaint on April 4, 1984. (R1-1). An Amended Complaint was filed on September 12, 1984, which asserted the following four counts: Count I asserted a claim under 42 U.S.C. § 1981 for Plaintiff's contract termination; Count II asserted a claim under 42 U.S.C. § 1981 for underpayment for years prior to 1979; Counts III and IV asserted pendent claims for intentional infliction of emotional distress and breach of an oral contract arising from Plaintiff's termination in 1980.

Defendants filed Motions to Dismiss the § 1981 claims of Counts I and II based on the expiration of the applicable statute of limitations for § 1981 claims. On October 11, 1986, the District Court granted the Motions to Dismiss based on the limitations defense. (R2-71). Plaintiff appealed. The Eleventh Circuit Court

of Appeals affirmed as to Count II, but reversed as to Count I, applying a four-year statute of limitations instead of the two-year limitation applied by the trial court.

On remand, Defendants answered (R4-128, 136), and discovery proceeded, which consisted of voluminous document production (R4-139, 140, 145, 148-155, 157-188, 164, 195, 198), and over forty depositions taken locally and around the country. (R4-142-143, R5-201, 208).

On April 4, 1990, Defendant, GULF & WESTERN, filed its Motion for Summary Judgment (R7-237) and Memorandum of Law in support thereof. (R7-242). On April 16, 1990, Defendants, RISK and HALL, filed their Motions for Summary Judgment (R7-256), and Memorandum in support thereof. (R7-257).

Local Rule 10(J)(2) of the United States District Court for the Southern District of Florida requires that all Defendants serving Motions for Summary Judgment also serve a statement of material facts as to which it is contended no genuine issue exists for trial. (See page vi. for Rule 10(J)(2), supra.) All Defendants served their Statements of Material Facts, along with their Motions for Summary Judgment in accordance with Rule 10(J)(2).

Rule 10(J)(2) further provides that all material facts set forth in the statement required to be served by the parties moving for summary judgment will be deemed admitted unless controverted by the opposing party in a statement of material facts as to which it contends that there does exist a genuine issue to be tried. Plaintiff did not file a statement of material facts, and did not controvert those Statements filed by the Defendants. Nor has he

ever sought to do so thereafter. As such, both Statements of Facts filed by the Defendants are deemed admitted.

A Pretrial Conference was held before the Court on April 19, 1990. Plaintiff then filed his Responses to Defendants' Motions for Summary Judgment. (R8-268, R9-269, 270).

In July, 1990, Plaintiff moved to expedite trial. (R12-298, 300). A Status Conference was held before the Court on August 31, 1990 and a hearing was scheduled for September 25, 1990 on Defendants' Motions for Summary Judgment.

On September 21, 1990, Plaintiff moved to amend his Complaint to alter certain factual allegations which he maintained as the basis for his § 1981 cause of action throughout the six and one-half years of discovery and court proceedings.[2]

---

[2] Plaintiff's Motion for Leave to Amend his Complaint was not even received by Defendants' counsel until the morning

(R13-319-320). Specifically, Plaintiff sought to claim that GULF & WESTERN refused to renew his contract in 1980. The attempt to amend at the eleventh hour was a belated attempt by Plaintiff to try to avoid the effect of Patterson v. McLean Credit Union, which held that there is no cause of action under § 1981 for post-contractual conduct. Plaintiff also sought to amend to assert a new cause of action under 42 U.S.C. § 1985, claiming that Defendants conspired during 1980 to discriminate in violation of this statute.

Defendants' Motions for Summary Judgment were argued on September 25, 1990, and granted by Order of November 30, 1990. (R13-327). The Court found that the allegations of Plaintiff's Complaint were re-

---

of September 25, 1990 at the hearing on Defendants' Motion for Summary Judgment.

lated to post-contractual activity[3] (a retaliatory termination) and barred by the case of Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1980). Summary judgment was also entered in favor of Defendants on the pendent claims. On December 28, 1991, the District Court entered judgment in favor of Defendants, and also denied

---

[3] Plaintiff states in his Petition for Writ of Certiorari that the District Court incorrectly found that the allegations of Plaintiff's Complaint do not relate to the making and enforcement of contract, but to conduct by GULF & WESTERN after the contract relation had been established. (Page 10, Footnote 2). However, a brief look at the allegations in the Complaint show that it is Plaintiff who is mistaken. The Complaint states,

1. That prior to the summer of 1980, Plaintiff contracted with GULF & WESTERN to be the company medical director.

2. That during the summer of 1980, GULF & WESTERN demanded that Plaintiff reduce his charges for care rendered to the alien, Negro employees, and

3. That as a direct and proximate result of Plaintiff's refusal, his contract was terminated.

Plaintiff's Motion to Amend his Complaint. (R13-329).

Plaintiff thereafter filed an Appeal with the United States Court of Appeals for the Eleventh Circuit. Plaintiff's Brief, filed August 20, 1991, argued that the District Court had erred in granting summary judgment for Defendants on the Plaintiff's § 1981 civil rights claim. Plaintiff argued that the Plaintiff's § 1981 claim was not barred by Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989), because Plaintiff's claim was premised upon the Defendants' offer for him to engage in a contract with racially discriminatory terms, not upon post-contractual conduct barred by Patterson. Plaintiff also argued that the District Court had abused its discretion in denying Plaintiff's Motion to Amend his Com-

plaint.[4] Finally, Plaintiff argued that the District Court erred in granting Defendants summary judgment as to the contract claim against GULF & WESTERN.

On April 17, 1992, a panel of the Eleventh Circuit Court of Appeals, after consideration of briefs filed by all parties, affirmed the District Court's judgment without issuing an opinion.

On May 6, 1992, Plaintiff then filed a Petition for Rehearing and Suggestion of Rehearing En Banc in the Eleventh Circuit Court of Appeals. This Petition was de-

---

[4] Plaintiff appealed this issue to the Eleventh Circuit Court of Appeal, claiming that the District Court had abused is discretion in denying his Motion for Leave to Amend. The Eleventh Circuit affirmed the District Court's decision.

Plaintiff's Petition for Writ of Certiorari does not set forth any reason why the District Court's ruling and the Eleventh Circuit's ruling on this matter should once again be reviewed. Because Plaintiff does not ask this Court to review this matter, the only complaint before this Court is the Amended Complaint filed September 14, 1984.

nied, and the Court entered its final Mandate. Thereafter, the Plaintiff filed a Motion to Recall the Mandate entered by the Eleventh Circuit Court of Appeals and a Motion to Stay the Proceedings pending his Petition for Writ of Certiorari to the United States Supreme Court. Plaintiff's Motion to Recall the Mandate and Stay the Proceedings was denied on October 6, 1992.

SUMMARY OF ARGUMENT

POINT I

This Court does not consider arguments not presented in the lower courts absent exceptional circumstances. Certiorari should be denied because the Petitioner never argued in the proceedings below that Patterson v. McLean Credit Union should not apply to this case relief was unavailable to him under Title VII. Defendant never afforded the lower courts the opportunity to consider whether Patterson applies to instances where relief is unavailable under Title VII. In fact, Petitioner has never made any showing that relief is not available to him under Title VII. By denying the lower courts the opportunity to consider these issues, Petitioner has waived his right to raise these issues now in the Supreme Court of the United States.

POINT II

Certiorari should be denied because Petitioner has never pled, argued or even suggested to the lower courts that he had a cause of action under the Civil Rights Act of 1991.

There was never any claim made by Plaintiff in his Complaint pursuant to the Civil Rights Act of 1991, nor was the Act's passage by Congress ever envisioned by the parties to this cause at the time of the alleged events in 1980, or during eight years of proceedings. Summary judgment had been entered in favor of the Defendants prior to the enactment of the Act. Application of the Civil Rights Act of 1991 to events that occurred over a decade prior to its existence would be patently unjust.

POINT III

Certiorari should be denied because Petitioner's argument that Patterson v.

McLean Credit Union does not apply to this case because relief is unavailable under Title VII is without merit and does not warrant this Court's consideration. This Court has specifically stated that § 1981 protects two rights: The same right to make contracts and the same right to enforce contracts. These rights do not extent, as a matter of either logic or semantics, to conduct after the contact relation has been established, such as the retaliatory termination claim alleged in Plaintiff's Complaint.

POINT IV

Certiorari should be denied because summary judgment in favor of the Defendants on the § 1981 claim can be affirmed on several alternate grounds. First, Plaintiff failed to present a prima facie case by failing to produce any evidence that the "BWI" contract workers were discriminated against due to the flat fee

billing arrangement. Second, the Defendants have articulated legitimate, non-discriminatory reasons for their actions in 1980. Finally, because neither RISK nor HALL had anything to do with the contract terms or renewal between the Plaintiff and GULF & WESTERN, there is simply no claim against either of these Defendants. Absolutely no reason exists to continue RISK and HALL's participation in this matter.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO RAISE THE ISSUES THAT PATTERSON V. MCLEAN CREDIT UNION SHOULD NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE UNDER TITLE VII IN THE COURTS BELOW.

The Court has consistently held that, absent exceptional circumstances, it will not address a question not raised in the Courts below. Adickes v. S. H. Kress & Company, 90 S.Ct. 1598, 1602, n.2 (1970); Rogers v. Lodge, 102 S.Ct. 3272, 3281 (1982); EEOC v. Federal Labor Relations Authority, 106 S.Ct. 1678, 1681 (1986); FTC v. Groiler, Inc., 103 S.Ct. 2209, 2212, n.6 (1983); Lawn v. United States, 78 S.Ct. 311, 324, n.16 (1958). In Duignan v. United States, 47 S.Ct. 566, 568 (1927), this Court stated that it "sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not presented or passed upon below are reviewed."

The Petitioner did not raise any of the arguments contained in his Petition for Writ of Certiorari in the courts below. Therefore, these arguments were not properly preserved and should not be considered by this Court in the first instance.

In District Courts, Defendants filed their Motions for Summary Judgment based on, among other grounds, the fact that Plaintiff's § 1981 claim was based upon post-contractual conduct, and therefore barred by Patterson v. McLean Credit Union. Specifically, Defendants pointed out that Plaintiff claimed that he was fired in retaliation for his refusal to discriminate against black alien workers. Defendants argued, and the Court agreed, that there is no cause of action under § 1981 for such post-contractual activity, as was held by this Court in Patterson v. McLean Credit Union.

Plaintiff argued that his claim was not based upon post-contractual activity; he argued that instead, his claim was based upon Defendants' refusal to form a new contract with him (R8-268, R13-358, pp. 29-35), and that his claim was therefore based upon conduct relating to his right to make and enforce a contract.

In Plaintiff's responses to Defendants' Motions for Summary Judgment, Plaintiff never argued the issue that he now asks this Court to consider -- that Patterson v. McLean Credit Union should not bar his § 1981 claim because Patterson should not apply to cases where relief is unavailable under Title VII. (R8-268; R13-359).

Plaintiff reiterated the same arguments that he made in the District Court in his Appellate Brief filed with the United States Court of Appeals for the Eleventh Circuit. Again, he did not press

the issue now before the Court. In fact, the only reference to Title VII made by the Plaintiff in his entire 30-page Brief filed with the Eleventh Circuit Court of Appeals occurred when Plaintiff, after advancing his arguments as to why Plaintiff's claim should not be barred by Patterson, stated, "It should also be noted that neither of these theories would fall within the scope of Title VII." (Appellant's Brief, P. 17). No explanation of this statement followed and this argument was not presented orally.

It is also important to note that Plaintiff merely assumes that he has no cause of action under Title VII, when there has never been any discussion of this matter in the courts below. Although Plaintiff assumes that no Title VII action could have arisen from Plaintiff's "non-employee" relationship with Defendants, Title VII does not require a common-law

employment relationship and does apply to physicians in private practice. Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988); Gomez v. Alexian Bros. Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1982); Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986); Mousari v. Beebe Hospital of Sussex County, Inc., 674 F.Supp. 145 (D. Dela. 1987).

The first time that Plaintiff presented his argument that Patterson should not apply to this case because relief was unavailable to him under Title VII was in his Petition for Rehearing filed after the Eleventh Circuit had affirmed the District Court's decision. This Court has held that issues raised for the first time in a petition for rehearing are claimed too late. Texas & P.Ry. Co. v. Southern Pac. Ry. Co., 11 S.Ct. 10, 12 (1890).

II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER DID NOT SEEK RELIEF PURSUANT TO THE CIVIL RIGHTS ACT OF 1991 DURING THE EIGHT YEARS OF PROCEEDINGS IN THE COURTS BELOW.

Plaintiff's Amended Complaint was filed in 1984. The Complaint attempted to state a cause of action under 42 U.S.C. § 1981. The claim was based upon events that occurred in 1979 and 1980, more than a decade prior to the adoption of the Civil Rights Act of 1991.

Litigation of this case proceeded for six and one-half years in the District Court. The District Court entered summary judgment in favor of the Defendants on November 30, 1990, almost one year prior to the adoption of the Civil Rights Act of 1991.

Because the parties never envisioned the adoption of the Civil Rights Act of 1991, Plaintiff never pled a cause of action pursuant to that Act in his Complaint. Obviously, the application of the

Civil Rights Act of 1991 to this case was never considered by the parties or by the District Court.

Petitioner appealed this case to the United States Court of Appeals for the Eleventh Circuit, again claiming that his Amended Complaint stated a cause of action solely under § 1981. Plaintiff's Brief was filed with the United States Court of Appeals for the Eleventh Circuit prior to the enactment of the Civil Rights Act of 1991. However, the Civil Rights Act of 1991 became effective on November 21, 1991, before the Court of Appeals had rendered its decisions in this case. Plaintiff never attempted to bring this issue to the Court's by filing a citation of supplemental authorities, as permitted by Rule 28(J) of the Federal Rules of Appellate Procedure, or by oral argument held before a panel of the Appellate Court, any time between the enactment of the Civil

Rights Act of 1991 in November, 1991, and the issuance of that court's Judgment on April 17, 1992.

After the United States Court of Appeal for the Eleventh Circuit affirmed the District Court's ruling, finding that Plaintiff did not state a cause of action under § 1981, Plaintiff filed a Motion for Rehearing and Suggestion for Rehearing En Banc on May 6, 1992. Once again, Petitioner never even suggested the possible application of the Civil Rights Act of 1991 to this case.

Thus, the very first appearance of this issue is now before the Court. Petitioner asks this Court to consider applying a statute under which relief has never been pled, argued or sought at any time during the eight years of proceedings in the courts below. The application of a statute to events which occurred more than a decade prior to its enactment, and to a

case where summary judgment had been entered in favor of Defendants prior to the adoption of the statute, is patently unjust. The Petitioner has never made a claim pursuant to the Civil Rights Act of 1991, and, therefore, there was no reason, and there still is no reason, for this Court to consider this issue.

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S ARGUMENT THAT PATTERSON V. MCLEAN CREDIT UNION DOES NOT APPLY TO THIS CASE BECAUSE RELIEF IS UNAVAILABLE UNDER TITLE VII IS WITHOUT MERIT.

This Court recognized in Patterson that, "The most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the making and enforcement of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief." 109 S.Ct. 2363 (1989).

Petitioner argues that if he has no claim under Title VII, the Court should somehow interpret § 1981 to provide him with a cause of action. However, by its plain terms, the relevant provision in § 1981 protects two specific rights: the same right to make contracts and the same right to enforce contracts. These rights do not extend, as a matter of either logic or semantics, to conduct after the con-

tract relation has been established, such as the retaliatory termination claim alleged in Plaintiff's Complaint. It simply does not follow that because a Plaintiff has no claim under one statute that he must have a claim under another. Section 1981 clearly indicates that Congress intended to protect a limited category of rights when it adopted the statute. These rights were not expanded until the adoption of the Civil Rights Act of 1991.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES PRESENTED ARE ONLY ANCILLARY AND NOT ESSENTIAL, AS THIS CASE CAN BE AFFIRMED ON SEVERAL OTHER DISPOSITIVE GROUNDS.

Any ground properly raised in the courts below may be urged in the United States Supreme Court as a basis for affirmance of the Court of Appeals' decision. Whitley v. Albers, 106 S.Ct. 1078, 1087 (1986); United States v. New York Telephone Co., 98 S.Ct. 364, 369, n.8 (1977). Because there are various alternate grounds for affirmance of the lower court's decision, it is unnecessary to decide any of the questions presented in the Petition for Writ of Certiorari.

A. PLAINTIFF FAILED TO PRESENT A PRIMA FACIE CASE.

First, in order to establish a § 1981 claim, intentional discrimination must be shown. General Building Contractor's Association v. Pennsylvania, 102 S.Ct. 3141 (1982). While merely "different" treat-

ment is not enough to establish a prima facie case, it is an indispensable element of one. It must be shown that the group allegedly subjected to unlawful discrimination was treated differently than similarly-situated employees who are not members of that group. Clark v. Huntsville, 717 F.2d 525 (11th Cir. 1983); Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303, 1312 (7th Cir. 1985), Murray v. Thistledown Racing Club, Inc., 770 F.2d 63 (6th Cir. 1985).

It is undisputed that Plaintiff billed for his treatment of contract workers (BWI's) on a flat fee agreement for fourteen years (R3-77, pp. 46-46, 54-55). He testified that he always rendered the same good quality of medical care to all workers, regardless of the fee schedule, as he was expected to do so by GULF & WESTERN. (R7-245, para. 4, R3-77, pp. 39, 53, 61, 63, 66; R6-234, p. 120; R6-232,

pp. 44, 67). In fact, Plaintiff testified that the BWI contract workers were treated "the same as the bank president." (R6-234, p. 120). In addition, Plaintiff testified that when the contract fee agreement was in effect, the rate structure was not based on race or alienage. (r7-246 PARA. IV(D)(6); R3-77, pp. 60-63, 108-109). The employer was billed at the same rate for blacks and whites. Billing for treatment of a Jamaican or other alien worker was the same as for domestic workers, except for BWI contract workers who were seen in large numbers during a short season. Since the differing rate structure was not based on race or alienage, and resulted in identical care, there was no unlawful intentional discrimination under the contract, and no prima facie case of a § 1981 claim.

B. ARTICULATED LEGITIMATE, NONDISCRIMINATORY REASONS EXIST FOR THE ACTIONS.

Despite Plaintiff's failure to pres-

ent a prima facie case, the record is replete with articulated and supported legitimate, nondiscriminatory reasons for the dismissal. First, it is undisputed that the Plaintiff was under suspicion of bill-padding. (R7-241, para. 12; R8-254, para. 7; R7-239, paras. 4-5). In addition, the Plaintiff himself admitted giving money to RISK's claims adjuster, Palmer Pierce, the very person who approved his bills. (R8-254, para. 9). In the District Court's Order granting summary judgment for Defendants, the court noted that, ". . . Plaintiff made undocumented loans to the claims supervisor which provided cause for termination." Finally, it was undisputed that in 1980, GULF & WESTERN's worker's compensation program underwent a total reorganization which resulted from an audit which was critical of RISK's efficiency, and from a concern about the overall effectiveness of the program ad-

ministration. (R8-254, para. 10). Plaintiff has offered no evidence to show that the above-stated reasons were merely a pretext for intentional discrimination.

C. NEITHER RISK NOR HALL PARTICIPATED IN THE DECISION TO TERMINATE PLAINTIFF.

Finally, the Plaintiff's claim against Defendants, RISK and HALL, is that somehow RISK and HALL caused him damage because they attempted to get him to go along with some racially-discriminatory scheme which violated 42 U.S.C. 1981.[5] Yet there has never been any evidence in the record to support this claim against these Defendants.

There is no "contract" claim against Defendants, RISK or HALL, because there was no contract between Plaintiff and these Defendants. Furthermore, RISK and

---

[5] Plaintiff moved to amend his Complaint on September 21, 1990, to include a conspiracy claim against RISK and HALL, but the motion was denied. Clearly this is an admission by Petitioner that no claims existed against RISK and HALL.

HALL had nothing to do with any contract terms or renewal between Plaintiff and GULF & WESTERN after January 1, 1979. Risk was simply the claims administrator for GULF & WESTERN.

Neither RISK nor HALL had any duty to select the "company doctor" for GULF & WESTERN in 1980. (R8-256, para. 2). Because RISK was terminated at the same time as Plaintiff by GULF & WESTERN, RISK was not involved in the termination of any alleged contract of Plaintiff, nor in the retention of Dr. Ramos as his replacement. As Plaintiff has freely admitted, GULF & WESTERN discovered that Plaintiff had loaned RISK's Palmer Pierce four thousand ($4,000.00) dollars (the very person approving his bills). The decision was then made by GULF & WESTERN to get rid of both claims administrator and the doctor.

There is simply no evidence that RISK had anything to do with Plaintiff's termi-

nation or the decision not to renew his services in 1980. As the District Court held in its Order Granting Final Summary Judgment, the Plaintiff's undocumented loans to RISK's claims supervisor provided cause for termination, a decision made solely by GULF & WESTERN.

RISK was a separate wholly-owned subsidiary of Frank B. Hall & Co., Inc. There was no evidence of any direct involvement in any way of the personnel of Hall. There was no evidence supporting any claim against Hall, and even if there were, it would only be derivative of RISK.

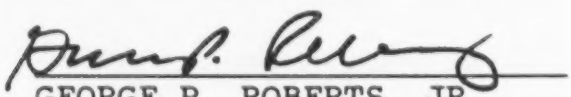
Absolutely no reason exists to continue RISK and HALL's participation in this matter.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

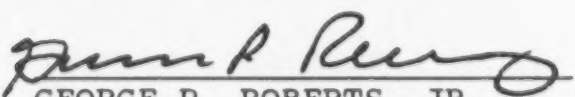
Respectfully submitted,

GEORGE P. ROBERTS, JR.
Counsel of Record
Suite 300, Comeau Building
319 Clematis Street
West Palm Beach, FL 33402-0709
TEL: (407) 832-5800

By: 
GEORGE P. ROBERTS, JR.
Florida Bar No.: 212059

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to ALL COUNSEL ON ATTACHED LIST, by U.S. mail, this 26th day of October, 1992.

ROBERTS & REYNOLDS, P.A.
Suite 300, Comeau Building
319 Clematis Street
Post Office Box 709
West Palm Beach, FL 33402-0709
TEL: (407) 832-5800
BROWARD LINE: (305) 427-3105

By: 
GEORGE P. ROBERTS, JR.

COUNSEL LIST

Terry E. Albritton, Esquire
810 Homedale Avenue
New Orleans, La. 70124
Counsel for Plaintiff

Philip M. Burlington, Esquire
1615 Forum Place
Suite 4-B
West Palm Beach, FL 33401
Co-Counsel for Plaintiff
Phone: 407-686-8010
Fax: 407-686-8663

Anthony E. Pucillo, Esquire
222 Piccadilly Street
Suite 100
P.O. Box 3131
West Palm Beach, FL 33402
Counsel for Defendant Gulf & Western
Phone: 407-659-5050
Fax: 407-833-3541

****
George P. Roberts, Jr., Esquire
P.O. Box 0709
West Palm Beach, FL 33401-0709
Counsel for Defendants Hall & Risk
Phone: 407-832-5800
Fax: 407-659-4891